BRIEF FOR PETITIONERS.

After the Federal Food, Drug, and Cosmetic Act went into effect, the Commission had no power to ban labels which are lawful under said Act. It had no jurisdiction to issue its order to cease and desist.

The Federal Food, Drug, and Cosmetic Act is the Act of June 25, 1938, chap. 675; 21 U. S. C. A. 301-392. The pertinent part of 21 U. S. C. A. 362 states:

> "A cosmetic shall be deemed to be misbranded—
>
> (a) If its labeling is false or misleading in any particular.
>
> (b) If in package form unless it bears a label containing,
>
> 1. The name and place of business of the manufacturer, packer, or distributor."

Hence the Administrator had full power to proceed against the labels in issue, if he considered that they violated the Act.

The Federal Food, Drug, and Cosmetic Act gives the usual power,

> "to promulgate regulations for the efficient enforcement of this chapter" (21 U. S. C. A. 371).

Such regulations were promulgated on Dec. 22, 1938. All said regulations have been effective since June 25, 1939. They are found in a publication entitled "Federal Security Agency—Food and Drug Administration—Service and Regulation Announcements", issued August, 1939, revised August, 1941.

The pertinent part of these regulations (Sec. 2.202, p. 34 of said publication) states:

"(a) If a cosmetic is not manufactured by the person whose name appears on the label, the name shall be qualified by a phrase which reveals the connection such person has with such cosmetic such as 'Manufactured for and Packed By—Distributed by' or other similar phrase which expresses the facts.

(b) The statement of the place of business shall include the street address, if any, of such place, unless such street address is shown in a current city directory or telephone directory."

The designation "cosmetic" includes a perfume in the Federal Food, Drug, and Cosmetic Act (21 U. S. C. A. 321 (1)).

The Administrator has specifically ruled that "cosmetic" includes perfume.

On Feb. 15, 1940 (Trade Correspondence Ruling No. 60), the Administrator was asked,

"Would requirements of statute be met if information required is placed on a tag label to be affixed to the neck of a perfume bottle?"

The pertinent part of the ruling stated:

"if the required information is stated conspicuously on the tag and permanently affixed to a label on the bottom of the bottle, the labeling requirements of the statute will have been met."

The Federal Food, Drug, and Cosmetic Act (21 U. S. C. A. 334) further provides that any adulterated or misbranded cosmetic,

"when introduced into or while in interstate commerce",

"shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district

> court of the United States within the jurisdiction of which the article is found."

If such libel had been filed, petitioners would be entitled to demand a trial by jury.

As an alternative, the statute (21 U. S. C. A. 332) provides for injunctive enforcement, in which case petitioners would be entitled to a trial by the Court and not by the Commission.

It is undisputed that no proceeding has ever been filed against petitioners or their merchandise, under the Federal Food, Drug, and Cosmetic Act.

The Order to Cease and Desist (R. pp. 115-116) goes beyond the Federal Food, Drug, and Cosmetic Act. There is nothing in said Act which forbids petitioners from using their corporate names, even though they do not state specifically in their labels, that their products are made in the United States. The Order to Cease and Desist (R. p. 116, par. 2) forbids petitioners from using their corporate names, without such warning phrases.

The Commission's Order is so broad that it would be insufficient for Houbigant, Inc. to state on its labels,

> "Houbigant Inc. 539 W. 45th St. New York, New York."

although this would fully comply with the Federal Food, Drug, and Cosmetic Act. Under the Regulation (*supra*, p. 7), if Houbigant Inc. is the manufacturer, it is not necessary to state that the perfumes are "Manufactured by", or to use any similar statement. It is enough to state the name and address of Houbigant Inc. It is even unnecessary to state the street address.

Under the Order to Cease and Desist, Houbigant must additionally state in perpetuity that its goods are manufactured in the United States, merely because it is the successor

to a foreign business. This is a clear case in which the Commission is attempting to legislate, by requiring more than is required by the Federal Food, Drug and Cosmetic Act.

Since the alcohol which is used to dissolve a perfume concentrate is odorless and evaporates immediately when the perfume is put on the skin or on a handkerchief, such alcohol has no effect on the quality of the perfume. Since petitioners imported the concentrates and merely dissolved them in domestic alcohol, they did not compound or manufacture the perfumes in the United States, under the Federal Food, Drug, and Cosmetic Act or the regulations thereunder. Petitioners have not violated said Act in any manner.

If petitioners did violate said Act, the Commission had no power to enforce it. It cannot demand that petitioners go beyond the requirements of the Federal Food, Drug and Cosmetic Act. Exclusive jurisdiction to restrain the acts in issue herein, has been vested in the Administrator, since the Federal Food, Drug, and Cosmetic Act went into effect. It makes no difference if this proceeding was instituted prior to June 25, 1938. The critical date is the date of the Order to Cease and Desist (R. pp. 115 and 116) namely, April 16, 1942. At this time, the Federal Food, Drug and Cosmetic Act had been in full effect for more than two years.

On April 16, 1942 the labeling control of the Food and Drug Administration was necessarily exclusive. The Federal Food, Drug and Cosmetic Act was enacted subsequently to all amendments to the Federal Trade Commission Act, including the enactment of the Wheeler-Lea Act.

United Corporation v. *Federal Trade Commission*, 110 Fed. (2d) 473, C. C. A. 4th, decided March 11, 1940.

It was held that the Commission had no jurisdiction to prevent the alleged false use of "Virginia" in labeling canned meats. It was pointed out that the Secretary of Agriculture had been given jurisdiction, to prevent any meat packer from engaging in or using any

> "unfair, unjustly discriminatory, or deceptive practice or device in commerce" (p. 474).

The Court stated (p. 475):

> "Only confusion would result from an overlapping jurisdiction * * *."

The Court further stated on pages 475 and 476:

> "And since the power of the Federal Trade Commission is purely regulatory and not punitive, it is clear that jurisdiction must exist at the time of the entry of the order. Jurisdiction at the time of the commission of acts objected to as unfair trade practices at the time of the filing of the complaint with regard thereto is not sufficient; for the order to be entered does not relate to past practices or determine rights as of the time of the filing of the complaint, as in an action at law, but commands or forbids action in the future. * * * An analogy is furnished, however, by the rule prevailing in equity to the effect that the court, in making its decree, is governed by the situation existing at the time the decree is entered, and not by that which existed at the inception of the litigation."

> "A case directly in point is Chamber of Commerce v. Federal Trade Commission, 8 Cir. 13 F. 2d 673, 685. It appeared in that case, that, while a proceeding against the Minneapolis Chamber of Commerce was pending before the Trade Commission, Congress passed the Futures Act, 7 U. S. C. A. Sec. I et seq, regulating a number of matters involved in the proceeding. In holding that as to these matters the Com-

mission ceased to have jurisdiction, notwithstanding that the proceeding had been filed before the passage of the Grain Futures Act, the Court said:

> 'The above act was passed after this complaint was filed but before the order was made herein. As the orders of the Commission are purely remedial and preventative, the effect thereof is entirely in the future. Therefore, the jurisdiction of the Commission should, in this respect, be measured as of the time of the order rather than as of the filing of the complaint or as of the hearing therefrom'."

In the original drafts of the Federal Food, Drug and Cosmetic Act, jurisdiction over false advertising of foods, drugs and cosmetics, was given to the Secretary of Agriculture. The Congress finally compromised the matter, by giving exclusive jurisdiction over *labeling* to the Food and Drug Administration, and giving exclusive jurisdiction over *false advertising* to the Federal Trade Commission.

In House Report No. 1613, 1st Session, 75th Congress, August 19, 1937, in referring to the amendment which gave the Federal Trade Commission jurisdiction over false advertising, instead of the Food and Drug Administration, it was stated (p. 5):

> "The Federal Trade Commission as an independent quasi-judicial body, has a procedure better calculated to handle multitudinous types of advertising and to do its work to the greater confidence and satisfaction of the public than any purely administrative body".

As further showing that the Wheeler-Lea Act excluded control over the labeling of cosmetics, said Act (15 U. S. C. A. 52), makes it unlawful,

"to disseminate, or cause to be disseminated, any false advertisement—

(1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics; * * * ".

It is stated in the Wheeler-Lea Act, 15 U. S. C. A. 55:

"For the purposes of sections 52, 53 and 54 of this title—

False advertisement.

(a). The term 'false advertisement' means an advertisement, other than labeling, which is misleading in a material respect;"

In 21 U. S. C. A. 321, it is provided:

"(m). The term 'labeling' means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article".

In the "Columbia Law Review" (1939), Vol. 39, page 266, in commenting on the Federal Trade Commission Act, as amended by the Wheeler-Lea Act, it is stated:

"The definition of 'false advertising' used in the statute is interesting; it is any advertising other than labeling, which is misleading in a material respect".

It is stated on page 266, in footnote 59:

"Jurisdiction over false statements in the labeling of products is vested in the Secretary of Agriculture. Public No. 717, 75th Cong. June 25, 1938, Sec. infra, p. 272".

On page 272, it is stated:

"Moreover, it seems unwise to split the jurisdiction over falsity of representation in the field of

> foods, drugs, devices, and cosmetics, between the Federal Trade Commission and the Secretary of Agriculture. Much duplication must result. If the A Company falsely represents, both on a label and in an advertisement, that its product is a cure for some disease, two proceedings will be necessary to halt it. A more efficient system would join these two jurisdictions in the same body."

On page 272, reference is made, on this point, to an editorial in the "Journal of the American Medical Association", Vol. 110 (1938), pages 1112, 1113.

The history of the Federal Food, Drug, and Cosmetic Act and of the Wheeler-Lea Act, is stated in,

> *United States* v. *Lee*, 40 Fed. Supp. 801, District Court, E. D. Wisconsin, per Judge DUFFY, reversed 131 F. (2d) 464, C. C. A. 7th.

This was an action for an injunction to restrain misbranding, under the Federal Food, Drug and Cosmetic Act.

Lee had distributed certain circulars to its agents, separately from its products. These agents displayed such circulars to retail customers, when defendant's products were sold at retail. Judge DUFFY dismissed the complaint, because he held that such circulars were *false advertising*, over which the Federal Trade Commission had exclusive jurisdiction, as distinguished from *misbranding*, over which the Federal Security Administrator had sole jurisdiction.

40 Fed. Supp. page 802:

> "In determining the intent of Congress, it may be helpful to recall the legislative history of the act in question, which at that time was commonly called the 'Copeland Bill'. The bill, as introduced, gave jurisdiction to enforce same to the Department of Agriculture. It was generally known at that time

that the Federal Trade Commission desired to enforce any provisions as to false advertising. While the Copeland Bill was pending, Public Act No. 447, 52 Stat. 111, 15 U. S. C. A. Secs. 41 et seq., was passed (approved March 21, 1938), which measure specifically gave jurisdiction over false advertising of foods, drugs, and cosmetics to the Federal Trade Commission. Thereafter the Copeland Bill was amended and, as passed (approved June 25, 1938), gave jurisdiction to the Department of Agriculture to enforce the provisions as to the adulteration, packaging, and labeling; but the enforcement as to false advertising remained in the Federal Trade Commission. On June 30, 1940, the enforcement of the Federal Food, Drug, and Cosmetic Act was transferred from the Department of Agriculture to the Federal Security Agency."

The Circuit Court of Appeals reversed, solely because it held that the circulars constituted *labeling*, as distinguished from advertising. It did not disagree with Judge DUFFY, on the question of jurisdiction between the Federal Security Agency and the Federal Trade Commission.

It was clearly the intent of Congress, in enacting the Federal Food, Drug and Cosmetic Act, to give new and exclusive jurisdiction over the labeling of cosmetics to the Food and Drug Administration.

House of Representatives Report No. 2139, 75th Congress, 3rd Session—April 14, 1938.

Page 2:

"The principal respects in which the measure differs from the present law are . . .

"The adulteration and misbranding of cosmetics is prohibited."

Page 9:

"Sections 601 and 602 define adulterated and misbranded cosmetics, respectively. They are entirely

new in Federal food and drug legislation. They are designed to safeguard the consumer against injury in the use of cosmetics and to require truthful labeling."

Statement of the Managers on the Part of the House. House of Representatives Report No. 2716, 75th Congress, June 11, 1938:

> "It is to be noted that the function of the Secretary in making regulations and orders to carry them out is legislative in character".

House of Representatives Report No. 429, 76th Congress, 1st Session, April 18, 1939.

Page 2:

> "The new law contains many provisions which were not contained in the old Food and Drugs Act of 1906. These provisions, in greater part, are designed to require informative labeling, in order that the purchasers may more intelligently select foods, drugs, and cosmetics for their needs, and in order to prevent the development of unfair competitive situations arising from labels which tell little or nothing. These provisions of the new law are sweeping in scope. They necessitate the revision of nearly all existing labels for these commodities."

Conclusion.

The petition should be granted.

Dated September 5th, 1944.

Respectfully submitted,

ASHER BLUM,
Counsel for Petitioners.